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No. 972

In the

Supreme Court of the United States

OCTOBER TERM, 1964.

HOLLAND FURNACE COMPANY,

Petitioner,

vs.

ELMER J. SCHNACKENBERG, ROGER S. KILEY and LUTHER M. SWYGERT, Circuit Judges,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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March, 1965

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Holland Furnace Company, a Delaware corporation, prays that a writ of certiorari issue to review both a judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter called "Court of Appeals") entered January 27, 1965, which imposed upon Petitioner a $100,000 fine for criminal contempt, and also its subsequent order, which refused, though good cause was shown, to modify or reduce said fine.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, is printed in the Appendix hereto, at pp. 2a-11a, R. 18-27.

A related opinion, entitled *Holland Furnace Co.* v. *Federal Trade Commission*, is reported in 295 F.2d 302 (7th Cir. 1961).

JURISDICTION.

The judgment of the Court of Appeals was entered on January 27, 1965. (Appendix pp. 12a-15a, R. 28-32) A timely motion for leave to petition for rehearing on sentence was filed on January 29, 1965, (Appendix, pp. 16a-23a, R. 33-42) and granted by the Court of Appeals on February 11, 1965. On the same day the petition was filed and the Court entered its order denying the petition and granting a thirty-day stay of execution. (R. 43) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether the failure of the Court of Appeals to order the pre-sentence investigation provided for by Rule 32 of the Federal Rules of Criminal Procedure, or its refusal, upon good cause shown, to grant Petitioner a hearing in which the unusual consequential effects of the $100,000 fine could be proven, deprived Petitioner of its right to a fair trial and a just sentence in a Federal court.

2. Whether the imposition of a $100,000 fine for criminal contempt of a temporary court order enjoining acts prohibited by order of the Federal Trade Commission is an abuse of discretion, where the purpose of the fine is solely to vindicate the issuing court's authority and is not to compel future compliance.

3. Whether the Court of Appeals ignored the controlling principles established by this Court in *United States* v. *United Mineworkers of America*, 330 U.S. 258 (1947), and departed from judicial standards in imposing a fine

of such magnitude as to jeopardize Petitioner's continued corporate existence.

STATUTES INVOLVED.

Rule 32, Federal Rules of Criminal Procedure. Appendix, p. 1a.

STATEMENT OF THE CASE.

On July 7, 1958, the Federal Trade Commission ordered Petitioner to cease and desist from eight specified selling practices found by it to be in violation of Section 5, Federal Trade Commission Act. On August 5, 1959, the Court of Appeals restrained Petitioner, *pendente lite,* from committing the acts prohibited by the Commission's order. That order was made permanent by the Court of Appeals on November 7, 1961. See *Holland Furnace Co.* v. *Federal Trade Commission,* 295 F.2d 302 (7th Cir. 1961).

On March 19, 1962, on the Commission's petition, the Court of Appeals issued a rule to show cause why Petitioner should not be adjudged in criminal contempt for wilful violation of the Court's order of August 5, 1959, by reason of acts committed in the period from August 5, 1959 to November 7, 1961. On April 19, 1963, additional respondents, including the former president and former members of Petitioner's board of directors were added, as parties respondent, in the criminal contempt proceeding.

On September 28, 1964, the Court of Appeals commenced the hearing of evidence in the contempt proceeding. Previously, the Court had denied Petitioner's motion for postponement of trial due to its counsel's illness, but excused Petitioner from appearing, by coun-

sel, at said hearing, "without prejudice to counsel for said respondent presenting argument in behalf of the corporation at the conclusion of the hearing or within a reasonable time thereafter". R. 1. On November 16, 1964, the day set for final argument, Petitioner's counsel appeared before the Court of Appeals to present argument, but was advised that he would be heard "as to the extent of the penalty or punishment" upon final disposition of the matter. The Court of Appeals stated: "You still have a right to be heard in case we hold against the corporation, and we will hear from you on the question of the form of relief to be granted." R. 4.

On January 27, 1965, the day set by the Court of Appeals for rendering its opinion and entering judgment, Petitioner's counsel appeared to present his argument. Before the Court rendered its opinion and pronounced sentence, Petitioner's counsel was permitted to make a brief oral argument. R. 9-16. The Court, thereupon, rendered its opinion and entered its judgment finding Petitioner, its former President, Paul Cheff, and two of its former sales executives guilty of criminal contempt of the temporary injunction of August 5, 1959. Appendix, pp. 2a-15a, R. 18-32. Eight respondents were found not guilty. Appendix, pp. 13a, 14a, R. 30. Petitioner was fined $100,000. Cheff, its former President, was sentenced to a six-month term of imprisonment. Fines of $500 were imposed on the two other respondents who were found guilty.

On January 29, 1965, Petitioner moved the Court of Appeals for leave to file a sworn Petition to reduce or modify sentence, and also moved for a hearing thereon and a stay of execution. Appendix, p. 16a, R. 33. Leave to file such petition was granted on February 11, 1965,

and, *instanter*, the Court of Appeals denied all relief, except for a 30-day stay of execution. R. 43-44.

Petitioner's sworn petition to reduce or modify sentence (Appendix, pp. 17a-23a) affirmatively showed (i) that, on Ju . 27, 1962, the Cheff management, which had committed the contumacious acts, was replaced; (ii) that the new management immediately terminated its retail furnace business and has since been engaged in the orderly liquidation of Petitioner's inventory through independent dealers, in order to avoid distress sale prices; (iii) that Petitioner's assets have declined by approximately ten million dollars since 1962 and, at the present time, are probably insufficient to pay, in full, its obligations to its creditors; (iv) that collection of the fine will result in the immediate cutting off of operating advances by secured creditors, thereby precipitating bankruptcy proceedings and the sale of Petitioner's remaining inventory at distress prices substantially lower than the amount which could be realized by orderly liquidation, as well as precluding the completion of pending merger negotiations, which may, if completed, enable Petitioner to meet its obligations; (v) that, in the circumstances, there is no possibility of future violation of the Court's or the Commission's orders, since Petitioner is no longer in the retail furnace business and no violations have been reported occurring since the management change in July 1962; and (vi) that the effects of the fine will be felt, 'marily, by Petitioner's creditors.

REASONS WHY THE WRIT SHOULD BE GRANTED.

The Court of Appeals' failure to follow the presentencing procedures established by Rule 32, Federal Rules of Criminal Procedure, and its refusal to consider

the effect of the sentence upon Petitioner's continued corporate existence, present important and unresolved questions concerning whether a court of appeals, in imposing sentence in a criminal contempt proceeding, must follow the procedural safeguards contained in the criminal procedure rules and observe rational standards in imposing sentence in contempt cases.

I.

Rule 32(a), Federal Rules of Criminal Procedure, directs that prior to imposition of sentence every defendant shall be given an opportunity to be heard and "to present any information in mitigation of punishment". Rule 32(c) provides that "unless the court otherwise directs", a pre-sentence investigation report shall be prepared for the court's assistance "in imposing sentence. . . ." Appendix, 1a. The use of such reports in fixing sentence is well established in the district courts and constitutes an integral and important element in the fair and equitable administration of criminal justice.

The Court of Appeals did not even consider that such a report was appropriate, and this procedural safeguard, intended to inform the court's discretion, was ignored by it.[1]

Petitioner does not question the power of the Court of Appeals to try criminal contempts arising out of its enforcement of Federal Trade Commission orders, although the sentencing procedure followed in this case

[1] The fine imposed upon Petitioner in this case appears to be the largest penalty for violation of a Federal Trade Commission order ever imposed, whether in a civil penalty suit (15 U.S.C. §45(6)(l)) or a contempt proceeding. See Volume 5 CCH Trade Reg. Rep. paras. 9701.40 and 9703 and cases cited therein.

clearly supports the suggestion of members of this Court that appellate tribunals are not equipped to perform, adequately, the functions of a trial court. *United States* v. *Barnett,* 376 U.S. 681, 724 (1964) (dissenting opinion).

However, the failure of the Court of Appeals to follow the procedure set forth in Rule 32, and its refusal to modify its sentence upon a proper showing of mitigating circumstances, demonstrates the necessity for a ruling by this Court, imposing the procedural and substantive standards of fairness contained in the Federal Rules of Criminal Procedure upon the courts of appeal in such cases. In view of the important function of the courts of appeal in enforcing the valid orders of administrative agencies, the questions thus presented are significant. The absence in such cases of any appellate review, other than by this Court, makes it appropriate and necessary that procedural safeguards be clearly laid down for the guidance of the Federal courts.

II.

The record upon which the Court of Appeals rendered judgment imposing a $100,000 fine upon Petitioner showed 25 violations of its temporary order, all of which occurred prior to the change in Petitioner's management. The Federal Trade Commission does not contest the "new management's" good faith compliance with the order or the fact that no further violations have occurred in the more than two and one-half years since the "new management" took over.

It is clear, therefore, that the punitive fine imposed was solely for the purpose of vindicating the Court's authority. Assurance of future compliance is manifestly no longer required from a company which has been in compliance for two and one-half years and which has

withdrawn from the business in which the violations occurred. The absence of any necessity of assuring future compliance should have been considered in imposing sentence. *United States* v. *United Mineworkers of America*, 330 U.S. 258, 303 (1947).

III.

This Court recently, in *United States* v. *Barnett, supra,* upheld the traditional power of Federal courts to punish criminal contempt without the intervening protection of the constitutional right of jury trial. This Court has made it clear, however, that the power to punish for criminal contempt is not without limits and that Federal courts have a "special duty to exercise such an extraordinary power with the utmost sense of responsibility and circumspection". *Green* v. *United States*, 356 U.S. 165, 188 (1958).

The manifest disregard by the Court of Appeals of the extraordinary and mitigating circumstances shown in Petitioner's petition to reduce sentence, which made clear the dire effect the fine will have, not only upon Petitioner, but also upon its creditors (*Cf. Moore* v. *United States*, 150 F.2d 323, 325 (10th Cir. 1945), *cert.* denied 326 U.S. 740 (1945)), is a clear abuse of the discretion thus vested in Federal courts and indicates a complete failure to apply the "responsibility and circumspection" required in such cases.

Moreover, such disregard of the effects of the fine imposed is squarely in conflict with the principle established by this Court in *United States* v. *United Mineworkers of America, supra.* In that case, involving the closing of all of the country's bituminous coal mines, this Court reduced a criminal contempt fine from $3,500,000 to $700,000 by treating $2,800,000 of the fine as a condi-

tional, or civil, contempt penalty, the payment of which could be avoided by the union purging itself of contempt. This Court explicitly held that Federal courts "must . . . in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's resources and the consequent seriousness of the burden to that particular defendant". (*Id.* at 304)

The failure of the Court of Appeals to consider the harshly punitive consequences of its fine upon Petitioner is in clear conflict with this principle and, since only this Court can review the decision of the Court of Appeals, this petition should be granted.

The increasing importance and number of Federal Trade Commission orders, whether enforced by contempt, as in this case, or by civil penalty suit (15 U.S.C. §45 (6)(1)), require the establishment by this Court of principles governing the procedural and substantive aspects of the imposition of economic penalties required to enforce administrative orders.

CONCLUSION.

For the foregoing reasons, we respectfully urge this Court to grant the writ of certiorari requested by the Petitioner.

Respectfully submitted,

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March 1965

APPENDIX.

Rule 32

FEDERAL RULES OF CRIMINAL PROCEDURE

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13671 SEPTEMBER TERM, 1964 JANUARY SESSION, 1965

In re: HOLLAND FURNACE COMPANY, *et al.*

January 27, 1965

(Filed Jan 27 1965)

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

This criminal contempt proceeding was begun on petition of the Federal Trade Commission alleging that respondents "knowingly, wilfully and intentionally" violated and disobeyed an order of this court of August 5, 1959, directed against respondents, by failing and refusing to comply with said order. The Rules to Show Cause issued. Issues were joined by respondents' answers, and this court, without a jury,[1] heard evidence and arguments on the issues.

In the August 5, 1959 order of this court, respondents were "commanded forthwith to obey and comply" with an FTC order, entered July 7, 1958, "until and unless," the Commission order "shall be set aside upon review by this court or the United States Supreme Court, or until further order of this court."

The Commission order of July 7, 1958 was entered at the conclusion of hearings of proceedings against Holland Furnace Company charging unfair methods of competition and deceptive acts and practices in commerce.

---

[1] Following the Supreme Court's decision in *United States* v. *Barnett*, 376 U.S. 681 (1964), this court denied motions of certain respondents for jury trial.

The order directed "respondent Holland Furnace Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device" in selling or distributing Holland products or services, to cease and desist from:

(1) Representing, directly or indirectly, that any of its employees are inspectors or are employees or representatives of government agencies or of gas or utility companies.

(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

(3) Representing that any furnace manufactured by a competitor is defective or not repairable or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(4) Tearing down or dismantling any furnace without the permission of the owner.

(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

(7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.

(8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

The Commission's order, as enforced by this court's August 5, 1959 order, remained in full force and effect and was made permanent by this court's affirmance of

the Commission's order on November 7, 1961. *Holland Furnace Co.* v. *FTC*, 295 F.2d 302 (1961). The contempt charges before us cover the period from August 5, 1959 to the entry of the final judgment by this court.

Certain respondents made requests for findings of facts "specially," under Rule 23(c), and for "special findings."[2] The court, in lieu of making the "special findings" requested, makes its own findings of fact and conclusions of law on the record and transcript of evidence as follows:

I.

Holland Furnace Company is a Delaware corporation with principal offices in Holland, Michigan. From April, 1946 to May, 1962 respondent Paul T. Cheff was Holland's president and chairman of its board of directors, owning 6,004 shares of stock. His wife, Katherine Nystrom Cheff, respondent, was a director from March, 1935 to May, 1962, and owned 43,004 shares of stock. Her nephew, respondent Edgar P. Landwehr, was a director from April, 1945 to May, 1962, and owner of 24,410 shares of Holland stock. Respondents John D. Ames, Ralph Boalt, Robert H. Trenkamp, and George Spatta were directors, respectively, from April, 1954 to June, 1961, from April, 1953 to May, 1962, from April, 1953 to July, 1962, and from April, 1951 to February, 1962. Ames owned 200 shares, Boalt 200 shares, Spatta 500-1000 shares, and Trenkamp 200 shares of Holland stock.

Resondent Alvin W. Klomparens was vice president and sales manager from April, 1956 to March, 1960. Richard J. Koerner, respondent, succeeded Klomparens as sales manager, from April, 1960 to April, 1961, and was also vice president from April, 1961 to June, 1962. Respondent Henry Weyenberg was production manager

[2] "That, if any or all of the above-named respondents is held to have been in contempt of this Court's order of August 5, 1959, this Court make special findings of fact as to the conduct, events, and circumstances upon which such contempt conviction is based, including findings as to the conduct, events, and circumstances underlying any finding of a violation of that order by any other respondent in this proceeding, including the Holland Furnace Company, if such a violation is an element in the finding that any or all of the above-named respondents has been in contempt."

and chief engineer of Holland from April, 1959 to April, 1960 and vice president after 1960. Jay A. Wabeke, respondent, was manager of Holland's Product Service Department from the time of its creation in September, 1959.

The parties to this proceeding stipulated that 164 "attachments" to the contempt petitions, 132 attachments to Holland's answer, and two attachments to the Commission's reply to Holland's answer "may be" received in evidence and be considered by this court as if affiants were witnesses; and that this court "may resolve" any conflicts in the affidavits and determine credibility of affiants. No concessions were made in the stipulation as to truth or falsity of the statements therein and as to whether respondents had power or authority over the "facts" stated in the affidavits or any responsibility for any alleged violations asserted therein. The parties waived right of confrontation of witnesses and right of cross-examination.

In its answer to the petition for contempt, Holland Furnace Company admits that the conduct of its employees in fifteen transactions, involving twenty-five separate violations, involving the following customers of Holland, violated the August 5, 1959 order of this court:

ALLEN, Atlanta, Georgia
BIBEAU, Spokane, Washington
CLAYMANN, Seattle, Washington
CONDON, Denver, Colorado
EHRICH, Albert Lea, Minnesota
EWING, Peabody. Massachusetts
GRUMLING, Mansfield, Ohio
HENDRICKSON, Albert Lea, Minnesota
HOOKER, San Francisco, California
NIELSEN, Chicago, Illinois
SHELLABARGER, Akron, Ohio
STEWART, Seattle, Washington
TAYLOR, Cuyahoga Falls, Ohio
THOMPSON, Cuyahoga Falls, Ohio
WINK, Spokane, Washington

In addition, the testimony shows that the Attorney General of Minnesota brought an action against Holland for unfair and deceptive practices by its employees, and several attorneys general in other states contemplated or threatened similar action. This testimony and the fifteen admitted instances of twenty-five violations by respondent Holland Furnace Company of this court's order of August 5, 1959 represent, exemplify and illustrate the contempt of this court's order during the entire period covered by petition throughout the entire territory in which respondent Holland Furnace Company operates, according to a regular and usual method by which the corporate respondent has in that period and in that territory sold and offered for sale its furnaces, heating equipment, and parts therefor.

We are convinced beyond a reasonable doubt, on the basis of the entire record, that Holland Furnace Company, acting through certain of its officers, agents, representatives and employees, through a "regular and usual" sales practice of its employees in commerce has "knowingly, wilfully and intentionally" violated and disobeyed in one or more instances each of the prohibitions of the August 5, 1959 order of this court; and accordingly we find the Holland Furnace Company guilty of criminal contempt of this court.

II.

We are convinced beyond a reasonable doubt, on the evidence in this case, that respondent Paul T. Cheff is guilty of "knowingly, wilfully and intentionally" causing and aiding and abetting in causing, in one or more instances, violations by Holland Furnace Company of each of the eight prohibitions in the August 5, 1959 order of this court.

There is abundant evidence from which we find that Cheff was the dominant head of Holland Furnace Company in the period during which the Holland sales practices subject of the Commission's cease and desist order occurred; that he was the dominant head of Holland

when the Commission's hearings were conducted, when the cease and desist order issued, when the August 5, 1959 order of this court was entered, and thereafter until May, 1962; that he was well aware of the condemned sales practices and of the prohibitions in the order of this court; that following the entry of the order Cheff made no bona fide attempt to comply or achieve compliance with the order; that on the contrary he pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation; that he established the Product Service Department, not to "discipline" the Holland organization or bring about compliance with this court's order, but as a facade behind which to continue the condemned sales practices; that his appointment of Wabeke to head the department was in furtherance of Cheff's plan to make no substantial change in Holland's sales practices since he could not help but know that Wabeke would not be effective in investigating complaints and disciplining the sales force; that Cheff had no intention of permitting Wabeke to be effective; that he frustrated Wabeke's sincere attempts to accomplish compliance with this court's order by telling Wabeke he had complete authority to discharge salesmen while telling others that Wabeke could only "recommend" discharge; that in the Holland Furnace Company house organ, the "Firepot," Cheff complained of recommendations to discharge salesmen, and that with the knowledge and approval of Cheff, salesmen whom Wabeke had recommended discharging were praised in the publication; that Cheff's occasional meetings with division sales managers, without Wabeke, at which he read from extensive notes to the eight or so in attendance, were apparent rather than real attempts to comply with this court's order; that instead of traveling to meet with Better Business Bureaus in various parts of the country to adjust serious complaints, he sent Wabeke and Weyenberg, neither of whom was suited to the purpose; that Cheff did not himself go out into the field to meet with branch managers or salesmen, or with Wabeke, to induce compliance

with the order, and did not take pains to see that his entire sales organization understood the seriousness of compliance, as did his successors in management by bringing 2,000 salesmen to Holland, Michigan; that his bulletin, "The policy we work by," purporting to bring about compliance with the courts order, carefully avoided the word "discharge" and purposely avoided mentioning restraint on unauthorized dismantling of furnaces—that the bulletin was ineffective to influence radical changes in Holland's sales policy, even if, and there is doubt of this, it reached the salesmen; and that Cheff's design in his relations with directors, employees or customers was to insulate Holland and himself from compliance with this court's order and from guilt for non-compliance.

Cheff made no substantial change after August 5, 1959 in Holland's sales practices or in the fundamental structure underlying the practices. Holland's policy remained the same: working on the replacement of furnaces instead of the original furnace market, operating on a straight commission basis with salesmen, and higher prices for Holland furnaces than its competitors, and realizing profit only on sales of furnaces, not on repairs or cleaning. The loose sales hierarchy, with tenuous relationship between Cheff and the sales managers, between them and the division sales managers, and between them and the branch managers, remained as it had been. Cheff remained aloof from the sales managers, division managers and salesmen. All this contributed to a condition which lent itself to undisciplined sales practices. Moreover, Cheff's unbending attitude toward the Commission's cease and desist order and his confidence in eventually setting it aside were an obstruction to change and to compliance with the court's order.

III.

Alvin W. Klomparens was employed by Holland in 1937, and served as sales manager and vice president from April, 1956 until April, 1960. He was succeeded by Richard J. Koerner, who was employed in 1948, and was a division sales manager when he was appointed by Cheff as sales manager to succeed Klomparens. After Koerner served in that position for one year, Cheff appointed him also a vice president.

We are convinced beyond a reasonable doubt, by the evidence in this record, that respondents Klomparens and Koerner aided and abetted in causing the proven violations of this court's order of August 5, 1959 during the respective periods of time each served as sales manager.

Both of these respondents were well aware of Holland's sales practices, of the proceedings before the Federal Trade Commission, and of the August 5, 1959 order of this court. The oral and documentary proof has convinced us beyond a reasonable doubt that each of these respondents willingly lent himself to Cheff's program of maintaining the sales practices which were prohibited by this court's order. They not only aided and abetted Cheff's design by disregarding what obligation the office of sales manager imposed on them in view of the order of this court, but they aided and abetted the violation of that order in an affirmative way. Klomparens edited the "Firepot," and requested, wrote and approved articles directed at the sales force with the intention of neutralizing any attempt by Wabeke's Product Service Department to bring about compliance. And Koerner, after his appointment as sales manager, wrote division sales managers that only he and Cheff had power to discharge and that sales managers must fight "obstacles" such as the Product Service Department and the Better Business Bureaus.

IV.

We find that the evidence does not prove beyond a reasonable doubt that Henry Weyenberg and Jay A. Wabeke caused or aided and abetted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with, the order of this court. They have not committed criminal contempts of this court and of its lawful authority.

During the period covered by the contempt citation herein, respondents Weyenberg and Wabeke had no real or effective power or authority over or responsibility for the sales operations of the company or the actions of its agents, representatives, and employees in connection with the offering for sale, sale, and distribution of its products and services, and no real or effective power or authority over or responsibility for the selection, employment, promotion, demotion, transfer, removal, or discharge of those agents, representatives and employees.

V.

We find the record shows that directors John D. Ames, Ralph Boalt, George Spatta, and Robert H. Trenkamp were grossly negligent in failing to perform fully their duties as directors of Holland Furnace Company and in relying upon Cheff's assurances that this court's order was not being violated or disobeyed. The gross negligence in this case does not, however, constitute criminal contempt. Trenkamp's position, as attorney for Holland during and after the proceedings before the Commission, imposed upon him a special responsibility, in addition to that which he had as director. It is questionable, to say the least, whether this professional responsibility was discharged by Trenkamp in a manner that reflected fully an awareness of this added responsibility.

There is no justification upon testimony in the hearing and the facts stated in their answers to the petition, which we are taking as true, to infer that these respondents did anything affirmatively or positively to cause

or to aid and abet in causing violations of this court's order. We have a reasonable doubt that they knowingly, wilfully and intentionally caused or aided and abetted in causing respondent Holland Furnace Company to violate the order. We find that the evidence does not prove beyond a reasonable doubt that directors Ames, Boalt, Spatta, and Trenkamp are guilty of the criminal contempt charged against them. The rule to show cause as to them is discharged.

What we have said in the next preceding paragraph about the above-named four directors applies equally to Katherine Nystrom Cheff and Edgar P. Landwehr, who filed no answers. The record is virtually silent as to them, and justifies only the inference that they were grossly negligent in their duties. It does not justify an inference that they knowingly, wilfully and intentionally caused or aided and abetted in causing the violation of this court's order. The rule to show cause as to them is discharged.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 4, Illinois
January 27, 1965

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

In re: HOLLAND FURNACE COMPANY) Petition
) for Crimi-
No. 13671) nal Con-
) tempt.

JUDGMENT ORDER
(Filed Jan 27 1965)

This cause having come on to be heard in open court on the petition of the Federal Trade Commission, filed March 19, 1962, and the order to show cause as prayed in said petition, which order was issued March 19, 1962, and which order directed Holland Furnace Company to answer said petition and to show cause, if any there be, why it should not be adjudged in criminal contempt of this court, and punished for such criminal contempt, by reason of having knowingly, wilfully and intentionally violated and disobeyed, and failed and refused to comply with an order of this court entered on August 5, 1959, in Cause No. 12451, entitled on the records of this court "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," all as appears from the said petition of the Federal Trade Commission, and the answer of Holland Furnace Company filed August 15, 1962,

and its further answer filed November 27, 1962, a reply to said answer and further answer filed April 18, 1963 by the prosecutors appointed by this court, together with said prosecutors' motion for a finding that Holland Furnace Company has committed criminal contempt of this court and that the court adjudge punishment accordingly, as well as the answer of Holland filed September 30, 1963; and

This cause also having been heard on the verified petition filed April 19, 1963 by the attorneys appointed to prosecute on behalf of the court, which petition named as additional respondents herein Paul Theodore Cheff, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg and Jay A. Wabeke; and the answer of said additional respondents filed herein, including the amendments to answer and a supplemental answer, the prosecution's replies to all of said respondents' answers, and the court having reserved its ruling on the motions of respondents Wabeke and Weyenberg that the order to show cause be discharged as to them; and

The court having heard and considered the evidence offered in open court in support of the petitions and the evidence offered by various respondents, and the cause having been submitted to the court thereon, and the court having considered the motions of the various respondents for a discharge of the rule to show cause and having considered the various briefs and memoranda of law filed by counsel representing all respondents and said prosecutor, and the court having this day filed a written opinion which makes findings of fact in this case;

The court finds that, as to the respondents Wabeke and Weyenberg, it has not been proved by evidence beyond a

reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to respondent Katherine Nystrom Cheff, the court finds that it has not been proved by evidence beyond a reasonable doubt that she knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to the respondents Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta, the court finds that it has not been proved by evidence beyond a reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abeted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with said order of this court entered on August 5, 1959.

It Is Therefore Ordered that said rule to show cause is hereby discharged as to said Henry Weyenberg, Jay A. Wabeke, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta.

And having considered the evidence offered in open court and the admissions made in the answer of respondent Holland Furnace Company, the court finds that it has been proved beyond a reasonable doubt that said respondent knowingly, wilfully and intentionally violated, disobeyed, failed and refused to comply with said order of this court entered on August 5, 1959; that, as to respondents Paul Theodore Cheff, Alvin W. Klomparens and Richard J. Koerner, the court finds that it has been

proved beyond a reasonable doubt that they and each of them knowingly, wilfully and intentionally caused, and aided and abetted in causing, the aforesaid violations by Holland Furnace Company of the said order of this court, entered on August 5, 1959; and said Company and Cheff, Klomparens and Koerner have thereby committed criminal contempt of this court and of its lawful authority.

It Is, Therefore, Ordered that said Holland Furnace Company, Paul Theodore Cheff, Alvin W. Klomparens and Richard J. Koerner be and they are hereby each adjudged in criminal contempt of this court, by reason whereof the court imposes a fine on said Holland Furnace Company of One Hundred Thousand Dollars, and costs to be taxed by the clerk of this court, payable forthwith and that execution issue therefor; and also by reason whereof the court sentences Paul Theodore Cheff to imprisonment for a period of six months and he is ordered committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for said period of six months; and also by reason whereof the court sentences the respondents Alvin W. Klomparens and Richard J. Koerner each to pay a fine of Five Hundred Dollars forthwith, and in default of payment of said fine each is to stand committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment until said fine be paid or until otherwise discharged as provided by law, said fines and costs to be payable to the clerk of this court, either in United States currency or a bank's certified check.

It Is Ordered that the clerk deliver a certified copy of this judgment order and commitment to the United States marshal and that the said copy serve as the commitment of those respondents subject to commital as aforesaid.

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 13671

In re

HOLLAND FURNACE COMPANY, ET AL.

MOTION OF RESPONDENT HOLLAND FURNACE COMPANY FOR LEAVE TO FILE PETITION FOR RECONSIDERATION, FOR REDUCTION OR REMISSION OF FINE, FOR A HEARING IN SUPPORT THEREOF, FOR RECONSIDERATION OF THE MOTION FOR A STAY OF EXECUTION AND FOR A FURTHER STAY OF EXECUTION

(Filed Jan 29 1965)

Respondent, Holland Furnace Company, by its attorney, Charles Trynin, respectfully moves this Court for leave to file the attached petition for a reduction or remission of the fine imposed on Holland Furnace Company, for a hearing at which Holland Furnace Company, (as constituted under new management since July 27, 1962), its creditors and stockholders may present facts and be heard, and for reconsideration of this Court's denial of a stay of execution, and for a further stay of execution, all as prayed for in the attached petition.

Dated: January 29, 1965.

/s/ Charles Trynin
Charles Trynin
Attorney for Respondent
Holland Furnace Company
c/o Leibman, Williams, Bennett
and Baird
208 South LaSalle Street
Chicago, Illinois 60604
FInancial 6-2200

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 13671

In re

HOLLAND FURNACE COMPANY, ET AL.
PETITION OF HOLLAND FURNACE COMPANY

To
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

The petition of Holland Furnace Company (herein the "Corporation") by Charles Trynin (herein the "affiant") respectfully shows to this Court, as follows:

1. The affiant, a member of the New York bar for thirty-five years, is a director and the secretary of respondent, Holland Furnace Company, and has been such since July 27, 1962, the date on which new independent management not affiliated with the Cheff group took control of said Corporation. He makes this petition, solely on behalf of respondent Corporation, in support of the attached motion, and is fully familiar with the matters herein set forth.

2. Because of affiant's illness, this Court most courteously, by order dated September 22, 1964, excused affiant from appearing as counsel for respondent Holland Furnace Company at the September 28, 1964 hearing and provided that substitute counsel for said respondent need not appear at said hearing and that counsel would be given an opportunity to present argument in behalf of the Cor-

poration at the conclusion of the hearing or within a reasonable time thereafter. As will more fully appear hereinafter, affiant desires an opportunity to present to the Court facts and circumstances which have transpired since the period in which occurred the actions which are the subject of this proceeding.

3. The affiant believes that because of new, unusual and special circumstances, to be set forth below, this Court will wish to consider setting a hearing at which such circumstances can be properly presented and will wish to consider, in the light of such circumstances, the appropriateness of the $100,000 fine imposed on said respondent and the impact of such fine on various banks and other creditors of respondent who are not connected in any way with the wrongs sought to be punished by said fine. These circumstances, have not heretofore been presented because no necessity therefor was apparent prior to the announcement of the Court's judgment. The pronouncement of the United States Supreme Court in *United States* v. *United Mine Workers of America,* 330 U.S. 258, 304, (see Brief for Petitioner appended) leads affiant to believe that it would be appropriate for the Court to consider such circumstances.

4. The special, unusual and new facts (not presently in the record since they arose after the events which were the subject of this contempt proceeding), which the Corporation desires the opportunity of presenting, establish the following:

(a) *New Management Since July 27, 1962.*

On July 27, 1962, new and independent management, unrelated to the Cheff group, took control of respondent Corporation. Affiant has been a director and secretary since that date.

(b) *Old Sales Program Abolished and New Distribution Policy Instituted.*

By action taken by the new management on July 27, 1962 all branches were immediately closed, all branch managers, retail salesmen and installers were immediately discharged and the factory at Holland, Michigan was closed. Since that date sales of furnaces have been made solely to dealers. All Sani-Vac Trucks have been disposed of and since July 27, 1962 the Corporation has not engaged in the furnace cleaning business. The entire sales policy out of which the complaints to the Federal Trade Commission arose was, on July 27, 1962, *abolished.*

(c) *Complete Compliance Since July 27, 1962,*

The Corporation has been in complete compliance with the orders of this Court since at least July 27, 1962, and no complaint has been filed with the Federal Trade Commission (or, to the knowledge of the Corporation, with any Better Business Bureau or State Attorney General) based on any sale made after July 27, 1962 or based on the sales practices of the Corporation in force after the abolition of the old sales policies on such date.

(d) *Corporation Liquidating.*

The Corporation has been in liquidation since August 1, 1962 and has suffered a decline and loss of assets exceeding $10,000,000 since that date.

(e) *Banks and Insurance Company Are Principal Creditors.*

The First National Bank of Chicago, Continental Illinois National Bank & Trust Company of Chi-

cago, Prudential Life Insurance Company of America, The Chase Manhattan Bank, Morgan Guaranty Trust Company, and First National City Bank are the principal creditors of the Corporation. All of its assets, (except inventory), are pledged to these creditors as collateral for loans made prior to 1961. As a result of the process of liquidation, these loans have been reduced to approximately $1,934,000 as of January 8, 1965.

(f) *Financial Evaluation by First National.*

According to a valuation made by The First National Bank of Chicago as of January 12, 1965, the estimated forced sale value of this collateral is approximately $973,100, or $961,900 less than the unpaid balance of the loans. Other creditors' claims aggregate approximately $712,000. In the event of a forced sale of such collateral, the estimated $961,900 deficiency of secured loans and the $712,000 of general creditors' claims would aggregate $1,674,000. To meet this $1,674,000 of unsecured indebtedness, the Corporation's only free assets consist of inventory made in 1962, having a book value of $1,389,000, including approximately 5,000 coal furnaces which are saleable only at the rate of about 1,000 furnaces a year.

(g) *Discretionary Advances by Banks.*

The Corporation has no free funds or working capital with which to continue, except discretionary advances out of collateral made on a week-to-week basis by the secured creditors to defray the operating costs of continued liquidation.

(h) *Possibility of Merger.*

The Corporation's only hope for survival and the only hope of creditors for payment in full lies in the consummation of a merger with another company which has been under discussion for several weeks. If this does not materialize within 30 days, the banks have announced that they will terminate the voluntary weekly advances to the Corporation. Should it appear imminent that these funds so released by these banks would be levied upon under the fine imposed in this proceeding, such advances would be immediately terminated, and the Corporation would be precipitated into bankruptcy. Merger possibilities would thereby be irrevocably lost.

(i) *Impact of Fine on Banks and Other Creditors.*

Under the foregoing situation, the entire burden of the fine imposed by this Court would fall on the creditors of the Corporation, both secured and unsecured.

(j) *Banks Wish To Be Heard.*

Promptly after the announcement of the judgment of this Court, affiant communicated with an officer of The First National Bank of Chicago, the designated agent for the secured creditors, and affiant is authorized to advise the Court that legal counsel for the secured creditors desire an opportunity, with the Court's permission, to present facts and evidence to support the claim that they and other creditors are the principal parties who would be seriously prejudiced and affected by the fine imposed upon the Corporation.

5. Petitioner believes that the equities of this situation, where "unsuspecting creditors or innocent stockholders" would be affected by the fine imposed, should be considered upon a motion to reduce or remit the fine. (See Brief appended).

6. In view of the very unusual and special circumstances set forth above which have developed since the cessation of the acts which are the subject of this proceeding, and in view of the absolute compliance by the Corporation since July, 1962, and the impossibility of any further violations by the Corporation, it is respectfully submitted that a hearing should be held on this petition and that upon proof of the matters herein related the fine should be substantially reduced or remitted.

7. Petitioner respectfully suggests that, if the Court determines that a hearing on this matter is appropriate, a stay of execution should be granted pending such hearing and the disposition thereof.

8. Petitioner respectfully suggests that the Court order a further stay of execution for a reasonable period of time, to enable the Corporation, by legal action, to seek exoneration from the former directors whose wilful conduct or gross negligence resulted in the imposition of the fine. By this means, harm to creditors and stockholders may be avoided, and those individuals (all financially responsible) whose actions or failure to act resulted in the Corporation being fined, may be required to bear the burden in the first instance.

Wherefore, Holland Furnace Company respectfully prays as follows: that this Court grant a hearing at which petitioner, its creditors and stockholders may be heard and may present evidence of the facts alleged herein for the consideration of this Court in determining the reason-

ableness of the fine, if any, which should be imposed upon petitioner; that pending such hearing and the determination thereof, this Court stay the execution of its judgment dated January 27, 1965 against Holland Furnace Company; that this Court reconsider the fine imposed upon Holland Furnace Company, and reduce or remit said fine; that, unless said fine is remitted, this Court grant a further stay of execution pending the completion of an action to compel payment of such fine by one or more of the individual respondents herein; and that this Court grant to petitioner such other and further relief as may be proper.

Holland Furnace Company
By /s/ Charles Trynin
Secretary and Director

State of Illinois)
County of Cook) SS.

Charles Trynin, being first duly sworn, deposes and says that he is the Secretary and a Director of Holland Furnace Company, that he has read the above and foregoing Petition subscribed to by him, and that the matters set forth therein are true and correct.

/s/ Charles Trynin

Subscribed and sworn
to before me this 29th
day of January, 1965.

/s/ Dorothy M. Belina
Notary Public

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773-167—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 972

HOLLAND FURNACE COMPANY, PETITIONER

v.

ELMER J. SCHNACKENBERG, ROGER S. KILEY AND LUTHER M. SWYGERT, CIRCUIT JUDGES

No. 1043

PAUL T. CHEFF, PETITIONER

v.

ELMER J. SCHNACKENBERG, ROGER S. KILEY AND LUTHER M. SWYGERT, CIRCUIT JUDGES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DECISION BELOW

The decision of the court of appeals (HF Pet. 2a–11a; C Pet. 18–28) [1] is reported at 341 F. 2d 548.

[1] "HF Pet." refers to the petition for certiorari in No. 972; "C Pet." refers to the petition in No. 1043.

JURISDICTION

The judgment of the court of appeals (341 F. 2d 554; HF Pet. 12a–15a; C Pet. 29–32) was entered on January 27, 1965. Motions for rehearing, vacation of judgment, acquittal, or new trial were denied on February 11, 1965. The petition in No. 972 was filed on March 10, 1965. On February 15, 1965, Mr. Justice Clark extended the time of petitioner in No. 1043 for filing a petition for a writ of certiorari to and including April 12, 1965, and the petition was filed on April 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in imposing a fine of $100,000 upon petitioner in No. 972 for its willful violation of a court order.

2. Whether the court of appeals was required to obtain a pre-sentence report before fixing the punishment of a corporation in a criminal contempt proceeding charging violations of the court of appeals' order.

3. Whether the evidence supports the conviction of petitioner in No. 1043.

4. Whether the sentence of six months' imprisonment imposed upon petitioner in No. 1043 was constitutionally permissible in the absence of a trial by jury.

STATUTE INVOLVED

Section 1(3) of the U.S. Criminal Code, 18 U.S.C. 1(3), reads:

> Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six

months or a fine of not more than $500, or both, is a petty offense.

STATEMENT

Holland Furnace Company, petitioner in No. 972, was convicted by the court of appeals of criminal contempt of that court for willfully violating an order of the court of appeals which had enforced a Federal Trade Commission order to cease and desist from specified fraudulent and oppressive practices in the sale of furnaces and parts to consumers. Paul T. Cheff, petitioner in No. 1043, who had been president and board chairman of the corporation, was also convicted of willfully causing and aiding and abetting in causing the corporation's violations. The court sentenced the corporation to pay a fine of $100,000, and sentenced petitioner Cheff to six months' imprisonment.[2]

The order which was violated was issued by the Court of Appeals for the Seventh Circuit on August 5, 1959, at an early stage of the protracted proceedings for review of the Federal Trade Commission decision. The court then found that immediate enforcement of the Commission's order was necessary to prevent injury to the public and to petitioner's competitors *pendente lite,* and it directed the corporation and its officers to comply with the Commission's order pending judicial review of that order. The court subsequently affirmed the Commission's decision and order (295 F. 2d 302) and, on November 7, 1961, issued a

[2] Two other officers, also convicted, were each fined $500. They have not petitioned for certiorari.

decree making permanent its earlier enforcement order. The Commission's order, as enforced by the court of appeals, directed the company, its officers and employees to cease and desist from making representations that its employees were inspectors and its salesmen heating engineers; from tearing down and dismantling furnaces without permission; and from misrepresenting the condition of dismantled furnaces and the feasibility of their repair.

In March 1962, the Commission filed in the court of appeals a petition for the institution of criminal contempt proceedings against the corporation, supported by 168 affidavits relating to alleged violations. The court issued show cause orders to both petitioners and to other officials of the corporation. The corporation admitted some violations and requested a judgment on the pleadings. Petitioner Cheff filed an answer denying guilt. He also filed a demand for a jury trial, which was denied by the court.

Pursuant to stipulation, the affidavits attached to the contempt petition and certain other documents were considered by the court in lieu of the testimony of live witnesses with regard to the corporation's alleged violations of the order; the hearing dealt primarily with the complicity of petitioner Cheff and other company officials. On January 27, 1965, in the presence of counsel for petitioners and all but one of the other defendants, the court heard counsel for the corporation (who had been excused from attending the hearing), announced and issued its findings and conclusions of law, and entered its order fixing the punishments of those convicted. The court said that it was convinced beyond a reason-

able doubt, on the basis of the entire record, that the company, through a "regular and usual" sales practice, had knowingly, willfully and intentionally violated the order of August 1959. It was also convinced beyond a reasonable doubt that respondent Cheff knowingly, willfully and intentionally caused and aided and abetted in causing violations by the company; that he was the dominant head of the company until May 1962, and was well aware of the condemned sales practices and of the prohibitions in the order; that he made no bona fide attempt to comply or achieve compliance with the order but, on the contrary, pursued a course of conduct designed to construct an apparent compliance and insulate himself from guilt as a facade behind which to continue the condemned sales practices.

ARGUMENT

1. The corporation, petitioner in No. 972, contends that the fine imposed upon it constituted an abuse of discretion in light of the standards prescribed by this Court in *United States* v. *United Mine Workers,* 330 U.S. 258, and *Green* v. *United States,* 356 U.S. 165, 187–189. The record in this case, however, supported the court's conclusion that the 25 specific violations admitted by the corporation were merely representative of "a regular and usual method" (HF Pet. 6a; C Pet. 22) of operations in which petitioner engaged during an extended period of time "throughout the entire territory in which" petitioner conducted its operations (*ibid.*). This flagrant and sustained course of conduct, which admittedly was in violation of the court's order, warranted the imposition of a substan-

tial fine. As this Court observed in *United States* v. *United Mine Workers*, 330 U.S. 258, 303:

> * * * In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. * * *

Moreover, the $100,000 fine was not excessive in light of the serious harm to the consuming public which the corporation caused by its violations of the court order. The total charges to the customers involved in the admitted violations, for example, came to more than $12,200.[3] In addition, between 1956 and 1961 a woman more than 70 years of age was sold seven furnaces for one house at a total cost exceeding $18,500.[4] Other documents in evidence tended to establish additional violations (not admitted, however, by petitioner) in which the charges totalled more than $26,500.[5] The court could consider these injuries to

[3] See the affidavits attached to the petition for institution of the contempt proceeding. Item 1, Envelope 1, Record in No. 1043.

[4] See Attachment 5 to the reply to the corporation's answer, which is in evidence by stipulation. The reply is Item 20, Envelope 3, Record in No. 1043.

[5] See Attachments 8, 11, 12, 24, 36, 51, 55, 56, 65, 71, 76, 78, 80, 85, 92, 112, 121, 128, 130, 150, 153, 156, to the petition for institution of the contempt proceeding. Item 1, Envelope 1, Record in No. 1043.

the public, as well as the evidence in the record regarding petitioner's total sales,[6] in determining the appropriate fine to be imposed on petitioner.

Nor is there any merit to the claim that the fine must be abated because of the change in the corporation's management and operations (HF Pet. 8–9). The facts were presented to the court of appeals before sentencing and in petitioner's motion to modify the sentence, and they were, upon due consideration, rejected as a ground for reduction of sentence. The new management took on the corporation with its then-existing liabilities, which included the possible imposition of a fine for its unlawful conduct; the corporation should not be absolved of its criminal liability merely because it may prove expensive to its stockholders or creditors. In light of the substantial benefits derived by the corporation from its long use of the illegal practices—which presumably inured to the benefit of stockholders and creditors—it was not "harshly punitive" for the court of appeals to impose on the corporation a fine of $100,000.[7]

2. There is no substance whatever to petitioner's claim that the court was required to obtain a pre-sentence report before imposing a fine on the corporation.

[6] The corporation's total sales exceeded $29,000,000 in 1960 and $24,000,000 in 1961. 1961 Annual Report, p. 3, Envelope 13, Record in No. 1043.

[7] Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), authorizes the imposition of a $5,000 civil penalty for each violation of a Federal Trade Commission order. In a civil suit, therefore, petitioner could have been penalized $125,000 for its 25 admitted violations.

Assuming *arguendo* that Rule 32(c) of the Federal Rules of Criminal Procedure applies to criminal contempt proceedings conducted in conformity with Rule 42, Rule 32(c) leaves it to the discretion of the court whether or not to request such a report. Moreover, the notion of a probation report with respect to a corporation is a singular one. Petitioner did not request such a report nor does it now suggest what such a report might contain or how it could be helpful to the court in determining the sanction to be imposed. Nor was petitioner deprived of any right of allocution or right to be heard prior to sentencing. Petitioner's counsel was heard before sentencing, and he then presented the facts regarding the changes in management—which were again presented to the court in the motion to reduce sentence.

3. The evidence was sufficient to sustain the conviction of petitioner Cheff. The court's finding that "he pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation" (HF Pet. 7a; C Pet. 23) is supported, *inter alia,* by petitioner's own testimony on cross-examination, wherein he admitted having taken no other steps in 1959 to obtain compliance than he had taken in 1952, in an earlier purported attempt—which he knew to have been ineffective—to stop the corporation's unlawful practices.[8] The record also supports the court's conclusion that petitioner "complained of recommendations to discharge sales-

[8] Compare Transcript 2065–2067 with Transcript 2080, Record in No. 1045.

men" who had violated the court's order and that with his "knowledge and approval * * * salesmen whom [the head of the complaint division] recommended discharging were praised in the [corporation's house organ]" (HF Pet. 7a; C Pet. 24). Petitioner was the author of an article making such a complaint, published on page 1 of the issue dated November 2, 1959 (Prosecution Exhibit 35).[9] That was the first issue after the head of the complaint division had recommended to petitioner that a salesman who had violated the court order be discharged.[10] The article complained about such discharge recommendations, and, in effect, repeated the same objection petitioner had made several days before in a letter to the corporation's counsel (Prosecution Exhibit 87). A special issue of the house organ published in March 1960 commended that salesman and others involved in similar incidents (Prosecution Exhibit 43).

Petitioner's related claim that the order did not put him on notice that failure to correct the practices engaged in by the corporation's salesmen might constitute a violation (C Pet. 6–11) lacks substance. The order directed the corporation and its agents to cease engaging in certain specified misrepresentations and deceptive or unlawful conduct "directly or through any corporate or other device." This adequately informed petitioner—the managing officer of the corporation—that if he did not take appropriate steps to modify his salesmen's practices, he could be held in contempt.

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[9] Transcript 789–790, 894–896, Record in No. 1043.

[10] Transcript 247–255, 783–787, Record in No. 1043.

The court of appeals listed a number of factors which "contributed to a condition which lent itself to undisciplined sales practices," included among which were certain details of the corporation's sales policies, organization, structure, and operations, and petitioner Cheff's management methods, behavior, and attitude (C Pet. 25). There is no merit to the contention (C Pet. 8–11) that Cheff had no notice that those factors were contributory to the corporation's use of the prohibited practices; the Commission so found in its decision issued over a year before the court order. 55 F.T.C. 55, 78, 88–89 (1958). The court clearly had the right to consider petitioner's actions in this context even though the policies, standing alone, might have been entirely lawful. Cf. *International Union, Etc.* v. *United States,* 177 F. 2d 29, 35–36 (C.A.D.C.), certiorari denied, 338 U.S. 871; *United States* v. *United Mine Workers,* 330 U.S. at 267. When the actual basis of Cheff's conviction is thus recognized, there plainly is no conflict between the decision below and that of the Ninth Circuit in *In re Floersheim,* 316 F. 2d 423 (1963).

4. The six months' imprisonment imposed on petitioner Cheff after denial of his demand for a jury trial is within the allowable punishment for a "petty offense" as defined in 18 U.S.C. 1(3), p. 2, *supra.* This satisfies the dictum in *United States* v. *Barnett,* 376 U.S. 681, 694–695, n. 12, as to the maximum permissible punishment pursuant to a non-jury trial. The issue involved in *Harris* v. *United States,* No. 526, this Term, is not, therefore, presented by this case.

CONCLUSION

For the foregoing reasons we respectfully submit that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

J. B. TRULY,
E. K. ELKINS,
MILES J. BROWN,
Attorneys appointed to prosecute on behalf of the court of appeals.

MAY 1965.

U. S. GOVERNMENT PRINTING OFFICE: 1965